

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF AND APPENDIX
FOR APPELLANT**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

—
No. 8407 FILED FEB 20 1943

—
Joseph W. Stinson
MARGARET McKELVY BAILEY, *Appellant*,

v.

JOHN RUSSELL YOUNG, C. W. KUTZ, GUY MASON,
Commissioners of the District of Columbia, *Appellees*.

—
**Appeal from the District Court of the United States
for the District of Columbia.**

—
MAURICE FRIEDMAN,
Attorney for Appellant,
Munsey Building.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8407.

MARGARET McKELVY BAILEY, *Appellant*,

v.

JOHN RUSSELL YOUNG, C. W. KUTZ, GUY MASON,
Commissioners of the District of Columbia, *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF OF APPELLANT.

JURISDICTIONAL STATEMENT.

This appeal is from a final judgment entered October 19, 1942 (App. 18) by the District Court of the United States for the District of Columbia in a condemnation action known as District Court No. 2783 (App. 1).

The jurisdiction of the lower Court was based on Section 1608 *et seq.* Annotated D. C. Code 1924 (Pages 436-441);

Title 25, Sec. 72 *et seq.*, D. C. Code 1929 (Pages 350-353); Title 7, Sec. 301 *et seq.*, D. C. Code 1940 Ed. (Pages 184-191); and Public Act No. 139, 76th Congress, approved June 20, 1939.

The jurisdiction of this Court to review the judgment of the lower Court is based on Title 18, Sec. 26, D. C. Code 1929 (Pages 159-160); Title 17, Sec. 101, D. C. Code 1940 Ed. (Page 421).

STATEMENT OF CASE.

This is an action by the Commissioners of the District of Columbia, appellees, to condemn a portion of land owned by appellant, Margaret McKelvy Bailey. Appellees sought to condemn 128 square feet of appellant's land (App. 3-4, 5). After filing the petition, notice and publication was ordered by the lower Court. This was published in the Evening Star and the Washington Post on March 17, 18, 24, 25, 1942 (App. 8) and in the Daily News on March 17, 18, April 6, 7, 1942 (App. 11). The order of notice provided for service by the marshal upon appellant before April 13, 1942 and was returned "Not to be found" (App. 8). A copy of the publication order of March 12, 1942 was served upon appellant on April 23, 1942 (App. 14).

Jurors were appointed (App. 9), a hearing was held at which only appellees were represented (Tr. 30), and a verdict of the jury was returned assessing certain benefits and damages (App. 11, 12). Notice of assessment benefits (App. 10) was published and this publication came to the notice of appellant (App. 15). Within the thirty day period required by Section 1608i of the 1924 Code and said order of assessments (App. 10) appellant, by special appearance, filed a motion in the lower Court to quash service and to vacate and set aside the verdict of the jury and objected to the proceedings for various reasons therein stated (App. 12-15) and urged in a supplemental memorandum (App. 15-17).

After several continuances (Tr. 18, 20-22), appellant's motion was denied (App. 17). The objections and excep-

tions were overruled and the verdict of the jury was ratified and confirmed (App. 18). This appeal followed.

More particular reference to the facts appearing in the appendix will be made where discussed in the argument.

STATUTES INVOLVED.

§ 7-301 (25:72). (Sec. 1608, 1924 Code). **Alleys and minor streets opened, extended, widened, or straightened by Commissioners-Conditions-Petition of land-owners-Minor street defined.**

The Commissioners of the District of Columbia are authorized to open, extend, widen, or straighten alleys and minor streets in the District of Columbia under the following conditions, namely: First, upon the petition of the owners of more than one-half of the real estate in the square or blocks in which such alley or minor street is sought to be opened, extended, widened, or straightened, accompanied by a plat showing the opening, extension, widening, or straightening proposed; second, when the commissioners deem that the public interests require such opening, extension, widening, or straightening; third, when the health officer of said District certifies to the necessity for the same on the grounds of public health: *Provided*, That a minor street shall be of a width of not less than forty feet nor more than sixty feet and shall run through a square or block from one street to another. (Mar. 3, 1901, 31 Stat. 1429, ch. 854, § 1608; Feb. 23, 1905, 33 Stat. 733, ch. 734, § 1608.)

§ 7-314 (25:81). (Sec. 1608f, 1924 Code). **Public notice of condemnation-Personal service on owner.**

The said court shall cause public notice of not less than ten days to be given of the filing of said proceedings, by advertisement in such manner as the court shall prescribe, which notice shall warn all persons having any interest in the proceedings to attend court at a day to be named in said notice and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and assessment of benefits of the jury; and, in addition to such public notice, said court, whenever in its judgment it is practicable to do so, shall cause a copy of said notice to be served by the United States marshal for

the District of Columbia, or his deputies, upon such owners of the fee of the land to be condemned as may be found by said marshal or his deputies within the District of Columbia. (Mar. 3, 1901, ch. 854, § 1608f, as added Feb. 23, 1905, 33 Stat. 734, ch. 734.)

STATEMENT OF POINTS.

Point 1.

The order of notice and publication was not complied with and there was no effectual notice to appellant because: (a) The property sought to be condemned was not described, (b) The order was not published according to its terms, and (c) The order was not served upon appellant according to its terms.

Point 2.

The conditions enumerated in Title 7, Section 301, 1940 Code (Section 1608, 1924 Code) were not complied with and appellees had no authority to either institute or proceed with their action, nor did the lower Court have jurisdiction over the proceedings in the absence of allegations in the petition and proof at the hearing of a strict compliance with the conditions enumerated in said Code section.

Point 3.

There was no proof of necessity or the existence of "public interest" and appellant should have been afforded the opportunity to be heard on these matters.

SUMMARY OF ARGUMENT.

1. The notice and order of publication was not complied with and there was no effectual notice to appellant.

(a) The notice and order did not describe the property of appellant, either in the caption or body thereof. Only the square number was given. The advertisement should have been such as would have informed appellant that it

was her land which was about to be taken. The reference to the petition did not cure this defect. The effect was to attempt to shift appellees' burden by charging appellant with the duty of giving herself notice. The attempted constructive notice was, therefore, fatally defective.

(b) The notice and order provided for publication thereof in three newspapers twice a week for two successive weeks commencing at least ten days before April 13, 1942. It was thus published in two newspapers. The third newspaper published on four occasions but not for two *successive* weeks. The manner and terms of publication being delegated to the court by Statute (Title 7, Sec. 314, 1940 Code; Sec. 1608f, 1924 Code), a strict compliance therewith is required; otherwise appellees are permitted to determine the manner and form of such constructive notice, contrary to the Code provisions and the mandate of the Court in this regard.

(c) The notice and order of publication provided that a copy be served by marshal upon appellant before the return date stated. In addition to appellees' petition containing this information, the marshal was furnished with appellant's name and residence. The latter was not served with such copy before the return date, although she was within the District during this period and could have been personally served. Apparently no effort was made to serve her before the return date, but the marshal had no difficulty serving her with such copy ten days thereafter. Even though service was attempted before the hearing, appellant's rights were seriously prejudiced. She was not notified of any other steps in the proceeding. She later did see a copy of the advertisement for benefit assessments.

Appellant was not afforded the notice to which she was by law entitled; appellees did not comply with the Statute nor with the provisions of the order and notice, and the subsequent proceedings were, therefore, null and void.

2. Title 7, Sec. 301, 1940 Code (Sec. 1608, 1924 Code) authorizes the Commissioners to institute condemnation pro-

ceedings only when all three of the conditions therein enumerated exist; and these conditions must be alleged in the petition and proven to exist, otherwise the proceedings must fail. Proper statutory construction requires the conclusion that the conditions stated are in the *conjunctive*, and not in the *alternative*; especially when this section is compared to the original section 1608 (31 Stat. L. pt. 1, p. 1189) which the present act repealed and supplanted. The original section authorized condemnation when any one of five conditions, in the *alternative*, existed. Appellees were without authority to proceed, and the lower Court was without jurisdiction to entertain the proceedings based upon only one of the conditions of this Section.

3. The petition alleges that appellees “. . . have deemed and determined that the public interests require additional land for alley purposes in Square 2102 . . . and that it is necessary to acquire the hereinafter described land by condemnation for said purposes.” At the hearing the sole proof of “public interests” was a copy of an order of the Commissioners directing the institution of proceedings “. . . such action being deemed necessary in the public interest.” Appellant contends that necessity and public interest were neither demonstrated nor proven. On the contrary, under the circumstances in this case there was no “public interest” involved, and appellant’s property is sought to be taken solely for private benefit—namely, to furnish easier access to a garage located on the only property against which a benefit was assessed. The burden of proving the allegations of necessity and public interest was upon appellees. They did not do so. Appellant urged the lower Court to permit her to be heard on this question, but the Court refused to consider this objection to the proceeding.

Even assuming jurisdiction to institute and maintain the action on one condition of this Code section, neither public interest nor necessity were proven, and appellant should have been allowed an opportunity to be heard on this jurisdictional question.

ARGUMENT.

1. (a) The petition filed by appellees in the lower Court and the notice and order of publication were captioned “. . . In re: Condemnation for acquisition of land in Square 2102 for alley purposes in the District of Columbia . . .” (App. 1, 7). Although a description of the property and the name and residence of appellant were contained in the petition (App. 3-4), this information was not contained in the notice and order.

It is fundamental that proper notice of condemnation proceedings must contain a description of the property sought to be condemned. 2 Lewis, Eminent Domain (3d ed. 1909) § 568.

Merely mentioning a square number, without more, can hardly be said to put appellant on notice that a portion of her property is sought to be condemned. The advertised notice to appellant should have been such as would have informed her that it was her land which was about to be taken, in order that it might be effective. Anything short of this renders the entire proceeding void. *Quackenbush v. D. C.*, 9 Mackey (20 D. C.) 300, 307-9.

The reference to the petition or plat on file did not cure the defect, nor can it be said that, because the advertisement mentioned the square number containing appellant's property, she might have suspected such action. 2 Lewis, Eminent Domain (3d ed. 1909) § 577.

The total inadequacy of this so-called notice is made apparent by a comparison with the notice and order to the property owner assessed for benefits (App. 10), which contained not only the lot and square numbers of appellant's property, but also the lot and square numbers of the property against which was assessed a benefit. Moreover, appellees were very careful to comply strictly with the statute (Title 7, Sec. 221 [25:71]) and notify the owners of the property assessed for benefits by registered mail and publication. So, while appellees were careful to give every opportunity for notice and protection in the latter case, ap-

parently it was thought that appellant, whose property was being taken, was charged with the duty of giving herself notice. It seems evident that Congress did not intend to give any more protection to the owners of property assessed for benefits than to the owners of the property to be condemned.

(b) The notice and order were required to be published twice a week for two successive weeks in each of three local newspapers commencing at least ten days before April 13, 1942 (App. 8). The advertisement appeared in the Star and Post twice a week for two successive weeks (App. 8). The News published on four occasions but not for two successive weeks (App. 11).

Under Title 7, Sec. 314, 1940 Code, the power and authority to determine the manner and terms of public notice are delegated to the Court which attempted to carry out this directive by its order of March 12, 1942. However, this order was not complied with. The result is that appellees are permitted to determine the manner in which publication and notice should be given, contrary to the Code provisions and the very terms of the Court order. *Lynchburg Invest. Corp. v. Rudolph*, 40 App. D. C. 129. *Edwards v. Brownlow*, 50 App. D. C. 331.

These defects were not cured at any stage of the proceeding, for appellant appeared specially in the Court below. Cf. *Wiegand v. Siddons*, 41 App. D. C. 130, 135. 2 Lewis, *Eminent Domain* (3d ed. 1909) 579.

(c) In the notice and order of March 12, 1942, the lower Court ordered that a copy of the same be served by the marshal upon appellant before April 13, 1942 (App. 8). The list of the parties to be served by marshal bears the notation "Not to be found 4/13/42." Yet the uncontradicted affidavit of appellant filed in support of her motion establishes that she was at all times within the District and easily available for personal service (App. 13-15). Not having been served in strict compliance with the terms of the order, it is submitted that her rights were seriously prejudiced.

On about April 23, 1942, ten days after the return date stated in the above order, a copy of the advertisement was served upon appellant. Evidently the lower Court denied appellant's motion on the theory that she had actual notice and failed to appear (App. 17). There are several answers to such a position: First, the Court overlooked the fact that its own order was not complied with in regard to the time of service; Second, the return date had expired and appellant received no notice of any continuance or further proceeding until she happened to see a copy of the publication for benefit assessments; and, Third, the copy of the notice served upon appellant was inadequate as a notice [See (a) *supra*]. This was not a case of default on the part of appellant—she took active steps to appear and contest the proceeding before the Court acted upon the verdict of the jury. To have been denied her day in Court and the opportunity to defend the action of appellees are the matters complained of by appellant. It was not a question of sleeping on one's rights, rather is it a situation where the very defective methods employed of giving notice gave rise to a proceeding where a property owner is deprived of her property without an opportunity to be heard.

2. The Act under which appellees sought to maintain the proceeding was passed February 23, 1905 (33 Stat. 733) (page 3, *supra*), which repealed and supplanted the previous section of the Code (31 Stat. 1189). It is important to note that the present section of the Code contains no words which indicate that the three conditions therein named are in the alternative.

The original section authorized the Commissioners to open or extend on presentation of a plat accompanied by a petition of more than one-half of the owners; *or when* the Commissioners certify that the preservation of peace and good order require; *or when* it is necessary for proper drainage; *or when* it is necessary to accommodate vehicle traffic; *or when* the health officer shall certify that opening, extension, widening or straightening of an alley is neces-

sary for the public health. All of these conditions were in the alternative.

Since the alternative words "or when" were omitted from the present section of the Code, it must follow that the words "... under the following conditions: ..." mean that the three conditions enumerated are in the conjunctive. A strict construction of this section allows no other meaning.

Therefore, appellees were required to have alleged and proven the existence of all three conditions named in said section in order to maintain their action. Otherwise their authority is lacking and the lower Court had no jurisdiction to condemn appellant's property.

This Court has not had occasion to pass upon this point, although it has been raised before in *Fay v. McFarland*, 32 App. D. C. 295, and *Rudolph v. Sensener*, 39 App. D. C. 385.

In the *Rudolph* case, *supra*, the lower Court (40 W. L. R. 260), while ruling in favor of the property owners on another point (discussed *infra* Point 3), took occasion in its written opinion to reject the above mentioned objections and ruled that only one of the conditions stated in Sec. 1608 need exist. It is submitted that the *dictum* in that case was wrong, especially when the other provisions of Sec. 1608 are considered. It is interesting to note, too, that in the *Fay* case, *supra*, the Commissioners proceeded under Sec. 1608 alleging the existence of *two* of the conditions stated in that section.

3. Appellees did not prove either the necessity for, or the existence of the alleged public interest in the proceedings below.

It has been decided by this Court that the matter of "public interest" is a jurisdictional requirement which must be satisfied and, if demonstrated that there is no such "public interest", the proceedings must fail. *Fay v. McFarland*, *supra*.

The only apparent showing of so-called public interest was the identification of a copy of an order of appellees

directing the Corporation Counsel to proceed to condemn appellant's property, ". . . such action being deemed necessary in the public interest . . ." (App. 19). On the other hand, another of appellees' witnesses testified that the only benefits to be realized was the convenience which two property owners might gain in getting to and from their respective garages (App. 20). And the jury found such a benefit to only one property owner (App. 12).

From the records of the Surveyor's Office for the District it appears that this Square 2102 was subdivided and the alleys dedicated in 1911 (App. 16-17). For more than 32 years the alley under discussion has been maintained, serving the adjacent property owners, the public and vehicles of the District. In 1924 appellant's property was improved and in 1926 a two-car garage was erected on Lot 806, the only property against which benefits were assessed (App. 17).

Since there was no proof of the existence of necessity or public interest, the record forces the conclusion that appellant's property is sought to be taken so that access to the garages on Lot 806 will be more convenient (App. 20). There can be no justification under the guise of "public interest" and necessity for the taking of the property of one person to benefit the owner of another, otherwise the rights of every property owner are endangered.

Moreover appellees are not even in a position to assert that any notice or hearing took place before reaching their conclusion of necessity or public interest as asserted in their order of January 28, 1942 (App. 19). Certainly appellant was entitled to be heard on these issues.

The questions of necessity and public interest have been construed in this jurisdiction to be the subject of judicial inquiry and are jurisdictional requirements which must be properly established. *Fay v. McFarland, supra*. These questions were not at all established, and it follows that the proceedings below were a nullity.

CONCLUSION.

Appellant attempted to be heard and presented her objections to the proceedings below by special appearance. She was denied her day in Court. Despite the obviously fatal defects in the record the action of appellees was sanctioned to the prejudice of this property owner. The value of the property sought to be taken may not be great, but the principles contended for by appellant are extremely important.

The lower Court should have granted appellant's motion and sustained her objections. The verdict of the jury should have been set aside and a new trial ordered so that appellant might have been afforded that protection and opportunity of a full and fair hearing to which she was entitled. Appellant submits that, if the action of the lower Court is permitted to stand, she will be deprived of her property without due process of law and in violation of the Fifth Amendment to the Constitution.

By reason of the various defects in the record this Court should reverse the judgment of the lower Court confirming the verdict of the jury, and grant to appellant a new trial.

Respectfully submitted,

MAURICE FRIEDMAN,
Attorney for Appellant,
Munsey Building.

APPENDIX

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8407.

MARGARET McKELVY BAILEY, *Appellant*,

v.

JOHN RUSSELL YOUNG, C. W. KUTZ, GUY MASON,
Commissioners of the District of Columbia, *Appellees*.

**Appeal from the District Court of the United States
for the District of Columbia.**

APPENDIX TO BRIEF FOR APPELLANT.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS DESIGNATED BY APPELLANT.**

1 Endorsed: Filed Mar 12 1942 Charles E. Stewart,
Clerk

In the District Court of the United States
for the District of Columbia

District Court No. 2783

In re: Condemnation for acquisition of land in Square 2102
for alley purposes, in the District of Columbia.

Petition

The petition of John Russell Young, C. W. Kutz and Guy
Mason, respectfully represents:

1. That they are the Commissioners of the District of Columbia and file this petition for the purpose of acquiring the hereinafter described land by condemnation for alley purposes in Square 2102 in the District of Columbia, pursuant to the provisions of Sections 1608 et seq., of the Code of Law for the District of Columbia, and Public Act No. 139, 76th Congress, approved June 20, 1939.

2. Section 1608 of the Code provides as follows:

“That the Commissioners of the District of Columbia be and they are hereby authorized to open, extend, widen or straighten alleys and minor streets in the District of Columbia under the following conditions, namely, First, upon the petition of the owners of more than one-half of the real estate in the square or blocks in which such alley or minor street is sought to be opened, extended, widened or straightened, accompanied by a plat showing the opening, extension, widening or straightening proposed: Second, when the Commissioners deem that the public interests require such opening, extension, widening, or straightening; Third, when the health officer of said District certifies to the necessity of the same on the grounds of public health: Provided, That a minor street shall be of a width of not less than forty feet nor more than sixty feet and shall run through a square or block from one street to another.”

2 3. Section 1608e of the Code provides as follows:

“That whenever it becomes necessary to open, widen, extend, or straighten alleys or minor streets by condemnation, the said Commissioners shall institute condemnation proceedings in the Supreme Court of the District of Columbia, sitting as a district court, by a petition in rem, particularly describing the land to be taken, which petition shall be accompanied by duplicate plats to be prepared by the surveyor of the said District, showing the courses and boundaries of the alley or minor street proposed to be opened, widened, extended, or straightened, the number of square feet to be taken from each lot or part of lot in the square

or block, showing the existing alleys or minor streets in said squares or block, and such other information as may be necessary for the purposes of such condemnation. Upon the filing of such petition, one copy of the plat, endorsed with the docket number of the case, shall be returned by the Clerk of said Court to the said surveyor, for record in his office."

4. That your petitioners, sitting as the Board of Commissioners for the District of Columbia, have deemed and determined that the public interests require additional land for alley purposes in Square 2102 as aforesaid, and that it is necessary to acquire the hereinafter described land by condemnation for said purposes.

5. That duplicate plats prepared by the surveyor of the District of Columbia, showing the boundaries of said proposed alley, the number of square feet to be taken from each lot or part of lot in the aforesaid square, and such other information as will be necessary in the judgment of your petitioners, for the purpose aforesaid, are filed herewith, as part hereof, marked "Exhibit, D. C. No. 1."

6. That the land necessary for the said public alley, with the names and addresses of the owners (so far as can be ascertained) of the fee of said land, and a particular description thereof, is as follows:

3

Description

Description of land to be acquired by condemnation for alley purposes in Square 2102.

Part of Lot 6, Square 2102.

Beginning for the same at the most northerly corner of said Lot 6, and running thence along the East line of a public alley 15 feet wide, with the West line of said Lot 6, South 15 feet; thence leaving the West line of said Lot 6 and running East 17.08 feet to the Northeasterly line of said Lot 6; thence with the Southwesterly line of a public

alley 15 feet wide, Northwesterly 22.73 feet to the point of beginning, containing 128 square feet.

Owner: Margaret McKelvy Bailey,

Residence: 3111 Cathedral Avenue, N. W.

4 The premises considered, your petitioners pray:

1. That public notice of not less than ten days be given of the filing of this petition by advertisement in such manner as this Honorable Court shall prescribe, warning all persons having any interest in these proceedings to attend Court on a day to be named in said notice and to continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits of the jury; and that a copy of said notice be served by the United States Marshal for the District of Columbia, or his deputies, upon such owners of the fee of the land to be condemned as may be found by said Marshal, or his deputies, within the District of Columbia.

2. That after the return of the Marshal and the filing of proofs of publication of said notice, this Honorable Court shall empanel a jury in accordance with the law provided for in such cases, to assess the damages each owner of land to be taken may sustain by reason of the aforesaid public alley, and the condemnation of the land for the purposes thereof, and to assess the benefits resulting therefrom, including the expenses of these proceedings as provided for in the aforesaid sections of said Code of Law, and the Act of Congress approved June 20, 1939.

3. That such other and further orders may be passed and proceedings had herein as are contemplated by the provisions of said Code to the end that the hereinbefore described land, in fee simple, may be condemned and secured for the purposes aforesaid.

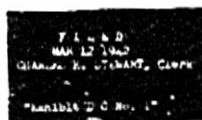
JOHN RUSSELL YOUNG,

C. W. KUTZ,

GUY MASON,

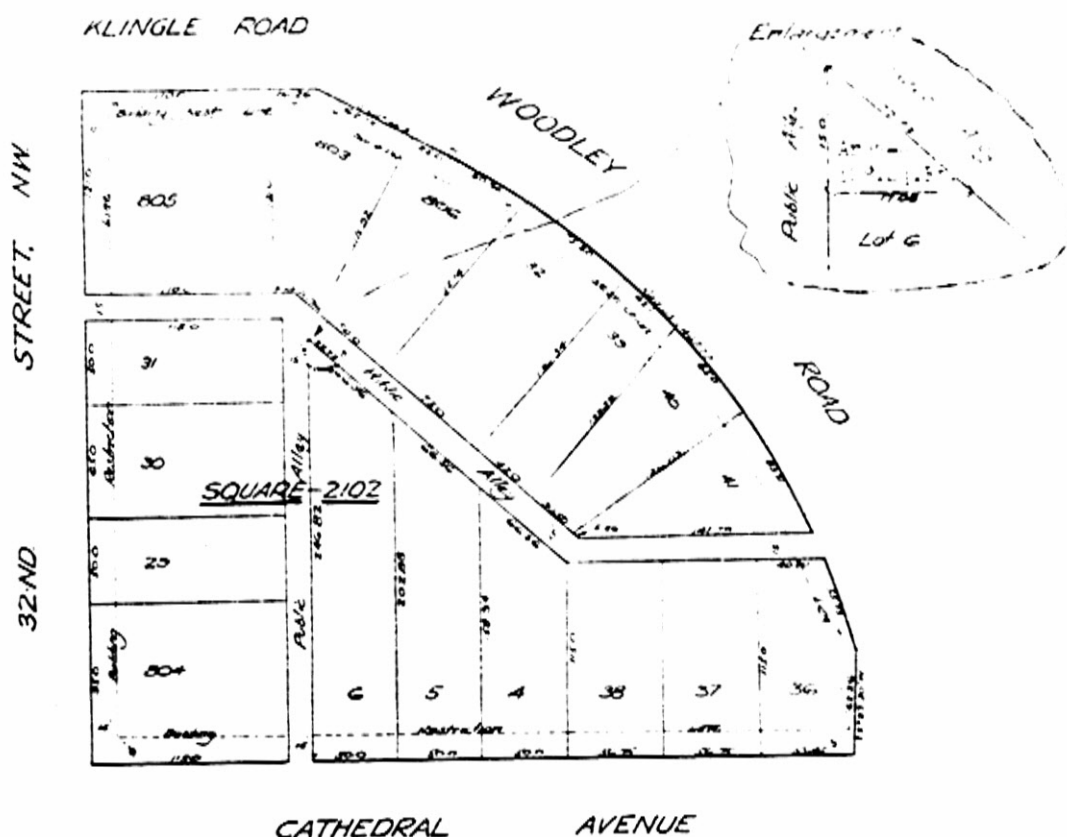
Commissioners, District of Columbia.

* * * * *



Condemnation

of part of lot 6
FOR ALLEY PURPOSES
SQUARE 2102



Drawn by *Richard*
Compared by *...*
Checked by *...*
S.O. Street
Street Extension Map # *14466*

ED 172990/23

Washington, D.C.
January 8th, 1942

Plat prepared in the office of the
Surveyor of the District of Columbia.

W. J. ...
Surveyor, District of Columbia

BEST COPY AVAILABLE

from the original bound volume

7 Endorsed: Filed Mar 12 1942 Charles E. Stewart,
Clerk

In the District Court of the United States
for the District of Columbia

District Court No. 2783

In re: Condemnation for acquisition of land in Square 2102
for alley purposes, in the District of Columbia.

Notice and Order of Publication

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of sections 1608 to 1610, inclusive, of the Code of Law for the District of Columbia, have filed a petition in this court praying for the condemnation of the land necessary for alley purposes in Square 2102, in the District of Columbia, as shown on a map or plat filed with the said petition as part thereof, and praying also that this court empanel a jury in accordance with the law provided for in such cases, to assess the damages each owner of land to be taken may sustain by reason of the condemnation of the land necessary for said alley purposes, and to assess benefits resulting therefrom, including the expenses of these proceedings, upon each lot or part of lot, or parcel of land, which will be benefited by said condemnation, in the proportion that the said jury may find said lots, parts of lots, or parcels of land will be benefited as provided for, in and by the aforesaid Code of Law, and by the Act of Congress approved June 20, 1939.

It is, by the court, this 12th day of March, 1942.

Ordered: That all persons having any interest in these proceedings be, and they hereby are warned and commanded to appear in this Court on or before the 13th day of April 1942, at ten o'clock A. M., and continue in attendance until the court shall have made its final
8 order ratifying and confirming the award of damages and the assessment of benefits of the jury to be empaneled and sworn herein, and it is further ordered that a copy of

this notice and order be published twice a week for two successive weeks in the Washington Evening Star, the Washington Post and the Washington Daily News, newspapers published in the said District, commencing at least ten days before the said 13th day of April 1942.

It is further ordered, That a copy of this notice and order be served by the United States Marshal, or his deputies, upon such of the owners of the fee of the land to be condemned herein as may be found by the said Marshal, or his deputies, within the District of Columbia, before the said 13th day of April 1942.

EDWARD C. EICHER,
Chief Justice.

9 *Memorandum*

April 13—1942

Proofs of publication in The Evening Star and The Washington Post—March 17, 18, 24, 25, 1942.

Proof of publication in The Washington Daily News—March 17, 1942.

Memorandum

April 13—1942

Order to impanel jury for April 27, 1942. Eicher, C. J.

10 Endorsed: Filed Apr 14 1942 Charles E. Stewart,
 Clerk

* * * * * * * * *

List of Parties to be Served by Marshal

1. Marguerite McKelvy Bailey, Not to be found 4/13/42
3111 Cathedral Avenue, Northwest,
Washington, D. C.

JOHN B. COLPOYS,
*U. S. Marshal in and for
the District of Columbia.*
By W. O. WALKER, JR.,
Deputy U. S. Marshal.

11

Memorandum

April 27—1942

Order appointing jury, directing jurors to view land and setting date of May 21 for trial.

EICHER, C. J.

12 Endorsed: Filed May 29 1942 Charles E. Stewart,
Clerk

* * * * * * * * *

*Mailing List of Persons Assessed Benefits None of Whose
Property Was Taken in This Proceeding*

Name	Address	Square	Lot
W. C. and A. N. Miller Development Company, Inc.,	1119 17th Street, N.W.,	2102	806

The above comprises all land or parcels of land, no part of which was taken in the proceeding, and which was assessed benefits, with last known address of person listed on the records of the Assessor of the District of Columbia as the owner or owners of land so assessed, obtained from the Assessor's records, the City Directory and the Telephone Directory.

Notice of assessment of benefits, with statement of amount assessed, was mailed to the above-named company at the above address, by registered letter, in accordance with the provisions of the Act of Congress, approved May 29, 1928 (Public No. 573-70th Congress).

RICHMOND B. KEECH,
Corporation Counsel, D. C.

JAMES W. LAUDERDALE,
*Assistant Corporation
Counsel, D. C.*

STANLEY DeNEALE,
*Assistant Corporation
Counsel, D. C.*

Attorneys for Petitioners.

13 Endorsed: Filed May 29 1942 Charles E. Stewart,
Clerk

In the District Court of the United States
for the District of Columbia

District Court No. 2783.

In re: Condemnation of part of Lot 6 in Square 2102 for
alley purposes in the District of Columbia.

*Notice and Order of Publication to Property Owners
Assessed for Benefits*

Notice is hereby given that the jury in the above entitled cause returned its verdict therein on the 28th day of May 1942, and by said verdict assessed benefits against the following parcel of land in the following amount:

Lot 806, Square 2102.....\$150.00

Therefore, it is by the Court this 29th day of May 1942,
Ordered: That the objections to said verdict of property owners assessed for benefits (no part of whose land was condemned in this proceeding) be filed in said cause on or before the 29th day of June 1942; otherwise said verdict will be finally ratified and confirmed upon the application therefor by the petitioners in said cause: Provided, however, that a copy of this notice and order be published once in each the Washington Post, the Washington Evening Star and the Washington Daily News, newspapers published in the District of Columbia, at least ten days before the said 29th day of June 1942.

EDWARD C. EICHER,
Chief Justice.

June 24—1942

Corrected proof of publication—Washington Daily News
—March 17, 18, April 6, 7, 1942.

* * * * *

54 Endorsed: Filed May 28 1942 Charles E. Stewart,
Clerk

Verdict of Jury

We, the jury in the above entitled cause, hereby find the following verdict and award of damages for and in respect of the land to be condemned and taken for the alley in Square 2102, in the District of Columbia, as shown on a map or plat filed with the petition in this cause, amounting to the sum of Eighty-Two & 00/100 Dollars (\$82.00), as set forth in Schedule No. 1, hereto annexed as part hereof.

And we, the jury aforesaid, hereby find the expenses of these proceedings to amount to the sum of Two hundred forty-seven 72/100 Dollars (\$247,72/100).

And we, the jury aforesaid, hereby find the amount of benefits accruing by reason of the condemnation of land necessary for the acquisition of land for alley purposes in Square 2102, in the District of Columbia, as aforesaid, to be the sum of One Hundred Fifty 00/100 dollars (\$150.00).

And we, the jury aforesaid, find the lots, pieces or parcels of land mentioned and described in Schedule No. 2, hereto annexed as part hereof, and we hereby find that the several lots, or parts of lots, pieces or parcels of land mentioned and described in said Schedule No. 2, will be benefited to the extent of the respective amounts mentioned and set forth in Schedule No. 2, and we hereby assess against
55 the said lots, or parts of lots, pieces or parcels of land, respectively, as and for benefits as aforesaid, the sev-

eral amounts specified and set forth in said Schedule No. 2.

Witness our hands and seals this 28th day of May, 1942.

MARTIN M. IRVINE (SEAL)

JNO. D. WILKINS (SEAL)

WALTER C. FLOUKHER (SEAL)

FRANK H. ROUZEE (SEAL)

JOHN J. BEATTY, JR. (SEAL)

* * * * *

57

Schedule No. 2

Benefits

Square 2102

	Amount assessed as benefits
Lot 806, Square 2102.....	150.00
Total benefits.....	150.00

15 Endorsed: Filed Jun 24 1942 Charles E. Stewart,
Clerk.

Motion to Quash Service by Publication & to Vacate & Set Aside Verdict of Jury

(Filed on behalf of Margaret McKelvy Bailey, whose address is: 3111 Cathedral Avenue, N. W., Washington, D. C.)

Now comes Margaret McKelvy Bailey, owner of record of Lot 6 in Square 2102, by her attorney, appearing specially and only for the purposes of this motion, and respectfully moves the Court to quash the service by publication and to vacate and set aside the verdict of the jury filed herein, and for reasons therefor states as follows:

1. The order of this Court of March 12, 1942 was not complied with and there was no effectual notice to this property owner.

(a) The property sought to be condemned was not described.

(b) The Notice and Order of March 12, 1942 was not published according to its terms.

(c) The Notice and Order of March 12, 1942 was not served upon the owner of the property in accordance with the terms of said order.

2. The Commissioners are without jurisdiction to institute or prosecute these proceedings because there is no "public interest" involved in the condemnation or taking of the property herein.

3. By reason of the defects apparent of record and described herein, the owner of the property involved herein has been greatly prejudiced and, if the verdict of said jury is allowed to stand, said owner will be deprived of her property without due process of law and in violation of the Fifth Amendment to the Constitution.

4. And for such other and further reasons as may be urged at the hearing of this motion.

MAURICE FRIEDMAN,

Attorney for Margaret McKelvy Bailey,
Appearing specially and only for the purposes of this motion.

* * * * *

16 Endorsed: Filed Jun 24 1942 Charles E. Stewart,
Clerk.

*Affidavit of Margaret McKelvy Bailey in Support of Motion
to Quash Service by Publication & to Vacate & Set
Aside Verdict of Jury*

District of Columbia, ss:

I, Margaret McKelvy Bailey, being first duly sworn on oath depose and say: That I am the owner of record of Lot 6 in Square 2102, improved by premises known as 3111 Cathedral Avenue, N. W., Washington, District of Columbia, and file this affidavit in support of the motion filed on my behalf to quash service by publication and to vacate

and set aside the verdict of the jury in the above-entitled cause. From March 12, 1942, the date when, I am advised, a petition was filed herein on behalf of the Commissioners of the District of Columbia, to the present time I have continuously and without interruption been within the District of Columbia and available for service of process or notice in this or any other cause. The premises which I own, and known as 3111 Cathedral Avenue, N. W., is my home where I have lived for many years, and where I lived from March 12, 1942, and where I now reside. I am and have been on the premises mentioned every day until either 11:00 o'clock A. M. or 12:00 Noon, at which time I generally go down town and remain at the business conducted by my son, which is located at 1237 G Street, N. W., until closing time, which is usually about 6:00 or 7:00 o'clock P. M., and then I return home where I remain during the evening and then retire to sleep at said premises. I had no personal knowledge of the institution of the proceedings herein until on or after about April 23, 1942, when I was personally served with a copy of the publication dated March 12, 1942. On the evening before, at about 10:30 or 11:00 o'clock P. M., after I had retired, someone who claimed to be a Deputy Marshal rang my door bell; and I inquired from my upstairs bedroom window about his business at that hour and, when I was told of his identity and that he had some papers to serve upon me, I requested him to return the following morning when I would be glad to accept service. On the following morning, which was April 23, 1942, according to my recollection, the same Deputy Marshal came to my home and I was served with a copy of said order of publication of March 12, 1942. I told the Marshal at that time that he could have brought these papers to me at any time before then, but the Marshal told me that because of his duties at Court, he could not have come to my home to serve me at the hours when I was at home, but that he had previously made visits to my home in the afternoon hours to serve me. After receiving the above-mentioned paper from the Marshal, I went down to

see the Corporation Counsel and was referred to the Assistant Corporation Counsel, Mr. Lauderdale, from whom I received a copy of the petition and some other paper and I got a copy of the order of the Commissioners seeking the taking of part of my land. I was under the impression that I would be notified of the trial of this cause, and fully intended to be present to protect my interest, but I did not receive a notification of the hearing, and I am now advised that such notification is not the usual practice in cases of this type. The next I knew was when I saw a copy of the publication order in this proceeding in the Evening Star, advertising the assessment benefits under a verdict of a jury in this cause.

I am advised that the proceedings in this cause, with respect to the service and publication is of no effect and I believe the same to be so; and further believe and expect to prove that there is no public interest to be served in the taking of my property in this proceeding. I have not had an opportunity to have my day in Court in this proceeding, and desire earnestly to be heard; otherwise I believe that I will be irreparably damaged and injured by the taking of my property in the proceedings that have taken place.

MARGARET McKELVY BAILEY.

Subscribed and sworn to before me this 19 day of June, 1942.

RUSSELL J. LEONARD,
Notary Public, D. of C.

(Seal)

* * * * *

23 Endorsed: Filed Oct 15 1942 Charles E. Stewart,
Clerk.

*Supplemental Memorandum in Support of Motion to Quash
Service by Publication & to Vacate & Set Aside Verdict
of Jury.*

(1) Under 1 (b) of the argument in support of this motion it was stated that the publication in the Washington Daily News appeared only once on March 17, 1942. This

was based on the proof of publication which then appeared in the record of this cause. However, at the time the motion was served at the office of the Corporation Counsel, a search through the files disclosed that two additional publications were made in the News—but—not twice a week for 2 successive weeks as ordered by this Court.

It is, therefore, submitted that, despite this attempt at correction, the order of this Court was not complied with in respect to the manner of publication, rendering the subsequent proceedings void.

(2) The Act under which petitioners seek to sustain this proceeding was passed February 23, 1905, 33 Stat. L. pt. 1, p. 733, which repealed 31 Stat. L. pt. 1, p. 1189. It will be noted that the present act contains no words which would indicate that the 3 conditions, under which the Commissioners could proceed, are in the alternative.

The original Section 1608 (which was supplanted by the present section) contained 5 conditions, each preceded by the words "or when" upon which the Commissioners could proceed to open, extend, widen or straighten alleys. Since the alternative words "or when" has been omitted from the present Section 1608, it must follow that the words "... under the following conditions:" are not in the alternative but in the conjunctive. A strict interpretation or construction of this section allows no other meaning. Therefore, all three of the conditions named in Section 1608 must be alleged and proved before the Commissioners can lawfully condemn the property of a citizen of the Dis-

trict. The presence of only one condition alleged,
 24 namely that of public interest, is fatal to this proceeding.

(3) From the record of the Surveyor's Office for the District of Columbia, in Subdivisions 42 at page 6, it appears that several parcels of land, among which was included the square now known as 2102, were surveyed and subdivided into lots, squares, public alleys, public highways and public parks on April 28, 1911. For more than 32 years, there-

fore, the alley now in question has been maintained, serving the adjacent property owners, the vehicles of the District of Columbia, and the public. This fact alone should be sufficient to question the "public interest" which necessitated the Commissioners to institute this proceeding.

The records of the Building Inspector's Office of the District of Columbia also shows that the property of Mrs. Bailey was improved by a house and garage in April, 1924; that the two-car garage on Lot 806 (the only property against which benefits were assessed) was constructed in March 1926. The owner of that garage could easily have built the same so that there would have been no difficulty whatsoever in getting to and from the same. It would seem that this difficulty of the owner of lot 806 is sought to be eliminated, because, from the only evidence adduced and the conclusion of the jury, only lot 806 is to be benefited, and the owner of lot 6 is to be penalized after all these years.

These facts simply illustrate the utter absence of any "public interest" underlying the proceedings.

It is submitted that on the facts presented, and the law discussed, the motion to quash and vacate should be granted.

Respectfully submitted,

MAURICE FRIEDMAN,

Attorney for Mrs. Margaret M. Bailey,
Appearing specially and only for the
purposes of this motion.

* * * * *

25 October 15, 1942.

No. 2783 D. C.

In Re Sq. 2102 for Alley Purposes

Submitted on Motion to Quash Service by Publication
and Set Aside Verdict.

Court's action 18-15-42. Motion denied.

EICHER, C. J.

See 20 Corpus Juris, pg. 934, note 80.

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26 Endorsed: Filed Oct 19 1942 Charles E. Stewart,
Clerk

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*Order Overruling Exceptions and Objections
and Finally Ratifying Verdict*

This cause coming on for hearing upon the exceptions and objections to the verdict of the jury returned and filed herein, and having been considered by the Court, it is, this 19th day of October 1942,

Ordered: That the said objections be and the same are each and all overruled; and that the said verdict be, and the same is hereby in all respects finally ratified and confirmed.

EDWARD C. EICHER,
Chief Justice.

* * * * * * * *

EXCERPTS FROM TESTIMONY.

Direct Examination

21 **Ethel G. Liebsohn**

was called as a witness for and on behalf of the District of Columbia and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. DeNeale:

Q. Mrs. Liebsohn, will you state your full name, please?
A. Ethel G. Liebsohn.

Q. I believe you are employed by the District Government? A. Yes.

Q. In the Office of the Secretary of the Board of Commissioners? A. Yes.

Q. Do you have with you certain papers showing the original order of the Commissioners authorizing this proceeding? A. Yes.

Q. Do you have that order with you? A. Yes.

Q. I show you what purports to be a copy of the Commissioners' order. Will you take that and look at that?

A. Yes.

Q. Have you made a comparison of that paper with the original? A. Yes.

Q. Is that an exact copy of the original? A. Yes.

Q. Have you initialed it? A. Yes.

32 Mr. DeNeale. If your Honor please, may this be marked D. C. Exhibit 2?

The Court: Yes.

(Copy of order of Commissioners directing institution of proceedings was marked as D. C. Exhibit 2, was received in evidence, and is as follows:)

“Government of the District of Columbia

Executive Office

Washington

January 28, 1942.

“Ordered:

“That the Corporation Counsel is hereby directed to institute condemnation proceedings under and in accordance with the provisions of Section 1608 et seq. of the Code of Law for the District of Columbia, and Public Act No. 139, 76th Congress, approved June 20, 1939, for the acquisition of land in Square 2102, in the District of Columbia, for alley purposes, as indicated in green on plat designated ‘Condemnation of part of Lot 6 for Alley purposes, Square 2102’ dated January 8, 1942, such action being deemed necessary in the public interest.

“By order of the Board of Commissioners, D. C.

“G. M. THORNETT,
Secretary to the Board.”

* * * * *

Robert W. Savage,

a witness called on behalf of the District of Columbia, after qualifying as a real estate broker and appraiser, and giving his opinion as to the value of the land sought to be condemned, testified as follows:

* * * * *

40 Q. Mr. Savage, have you recognized any special benefits that attach to the surrounding property, any of the surrounding lots? A. Yes. I have appeared in a great many cases where the question of benefits was involved. I went over this square quite carefully.

41 There are many garages serving the houses, and all of them set well back of the alley line with the exception of those on Lot 806 which are opposite the parts taken. Those garages all are approximately on the alley line, but because of this projection of Lot 6, it is difficult to get into those garages. I believe that Lot 806 because of this condition is benefited to the extent of \$150. as a result of this taking.

Now, I recognize a further benefit to Lot 31. The garages on Lot 31 are built in and well back of the line, but being directly opposite this taking, driving into them will be much easier particularly to traffic that may come in through the alley from Woodley Road. I place a benefit of \$50 on Lot 31.

That is the extent of my benefits, and the only benefits to those lots.

